

# MEMORANDUM

**TO:** Members, Clark Fork Basin Water Management Task Force (Task Force)  
**FROM:** Gerald Mueller  
**SUBJECT:** Summary of the March 5, 2007 Task Force Meeting  
**DATE:** March 10, 2007

## Participants

The following people participated in the Task Force meeting:

### *Task Force Members:*

Holly Franz	PPL Montana
Fred Lurie	Blackfoot Challenge
Marc M. Spratt	Flathead Conservation District/Flathead Chamber of Commerce
Nate Hall	Avista
Harvey Hackett	Bitterroot Water Forum

### *Ex Officio Member*

Sen. Verdell Jackson

### *Staff:*

Gerald Mueller	Consensus Associates
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### *Public*

Steve Fry	Avista
Blair Strong	Avista
Mike McLane	DFWP
Kirk Hafferman	DNRC Kalispell Water Resources Regional Office
Terri McLaughlin	DNRC Water Rights Bureau Chief
Candace West	Attorney General's Office

## Meeting Agenda

- February 5, 2007 Meeting Summary
- House Joint Resolution 3 Implementation Update
- Legislative Updates
- DNRC Water Rights Permitting in the Clark Fork River Basin
- Attorney General's Opinion and Water Court Storage Water Right
- Attorney General Bottomly 1947 Opinion, Don Brown District Court Decision, and the Montana Supreme Court Decision in MPC vs. Carey
- Public Comment
- Next Meeting

## February 5, 2007 Meeting Summary

The Task Force made no change to the February 5, 2007 meeting summary.

## House Joint Resolution 3 Implementation Update

Gerald Mueller discussed the following bills.

SB 376 - This bill, sponsored by Senator Jackson, has made it through the Senate on a

unanimous vote with amendments drafted by DNRC. The amendments add Lake Koocanusa and cap the total amount of water that the state can market at 1 million acre-feet. A copy of the bill as it passed the Senate is attached below as Appendix 1.

HB 443 - This bill, sponsored by Rep. Taylor, would appropriate \$260,000 to DNRC to take the initial step in the process to develop a contract with the Bureau of Reclamation for Hungry Horse water. The bill has had a hearing in the House Appropriations Committee. Because Rep. Taylor is a vice chair of the committee, Mr. Mueller expressed hope that the bill will pass.

### **Legislative Updates**

Gerald Mueller and Holly France led a discussion of the following bills.

SB 324 - This is the Task Force bill sponsored by Senator Jackson to require that state agencies send pump test data to the Montana Bureau of Mines and Geology and that well drillers report the location of their wells using two methods. It has passed the Senate on a unanimous vote.

HB 304 - This bill, sponsored by Rep. Furey, has passed out of the House Natural Resources Committee and will now be considered by the Appropriations Committee. As drafted, it would have established a permanent interim legislative water policy committee. As amended, the bill now appropriates \$50,000 for an interim study of the "hot" water topics, including:

- Surface water and ground water in closed basins and mitigation, augmentation, or aquifer recharge;
- Methods for the management of water, particularly in closed basins, to ensure compliance with closed basin law;
- Determining an appropriate, accurate, and time- efficient process for coordinating water quality requirements with the water appropriations process;
- Wells that are exempt from the permitting process; and
- An analysis of water marketing and water reallocation options available in montana.

HB 304 terminates after two years.

LC 1383 - This bill, which has not yet been formally introduced, is sponsored by Rep. McNutt and is a replacement for HB 138, which was the DNRC augmentation bill, and HB 373, the Stockgrowers bill to address the Montana Supreme Court decision in TU vs. DNRC. The hearing on the latter two bills lasted some three hours before the House Natural Resources Committee. Those testifying did not agree about how to proceed. The testimony by both proponents and opponents indicated a suspicion of the DNRC. LC 1383 has not yet been introduced. Because it includes an appropriation, the bill will be heard in the Appropriations Committee and is subject to a March 29 2007 transmittal deadline. Drafts of bill have been circulated on behalf of Rep. McNutt by Krista Lee Evans, the Legislative Services staff person drafting the bill. The latest draft attempts to protect senior water rights by requiring a hydrological report as a part of new ground water permit applications. It voids augmentation plans previously approved by the DNRC outside of the upper Clark Fork River basin, the only area of the state for which statutory authority exists for augmentation plans. It also subjects approved ground water permits to a monitoring period and possible permit modification as a result of the monitoring.

SB 377, 425, 435, 471 - These bills were sponsored by Senator Jackson. All were tabled in either the Senate Judiciary or Natural Resources and Energy Committees. SB 377 directed the attorney general to object to hydropower water rights in the Montana Water Court. SB 425

would have required that adverse effects be measurable rather than calculated. SB 435 would have subordinated hydropower water rights to other upstream water rights. SB 471 would have subordinated Noxon Rapid's water rights to upstream irrigation and domestic water uses.

### **DNRC Water Rights Permitting in the Clark Fork River Basin**

Terri McLaughlin, DNRC Water Rights Bureau Chief, and Kirk Hafferman, DNRC Kalispell Water Resources Regional Manager, reported on recent DNRC actions and discussions regarding water rights permitting in the Clark Fork River basin. In late December 2006, DNRC issued a final order denying the Thompson River Lumber Company permit because the applicant failed to prove both that water can reasonably be considered legally available and that the Avista hydropower water rights will not be adversely affected. The applicant had sought a permit for a water right for use of 250 gpm of water from the Clark Fork River. DNRC has decided that this ruling does not mean that the basin is closed to new water right permits. DNRC will continue to entertain applications but will explain that a new applicant will have a high hurdle to overcome to meet his or her burden of proving the legal availability of water and that the existing hydropower water rights will not be adversely affected.

The Task Force discussion raised the following questions and/or issues. DNRC answers to individual Task Force member questions are noted.

- *Could the applicant have presented a mitigation plan to reimburse Avista for the forgone electricity not generated because of the 250 gpm withdrawal?*

Answer - Electricity purchases or exchanges are not relevant to the criteria that must be met before a water right permit could be issued.

- *Do statutes define adverse effects in terms of a calculable effect?*

Answer - No. However, DNRC practice and case law support the calculable approach.

- *Did the Thompson River application include an augmentation plan?*

Answer - No, and none came in through the hearing record.

- *Could an application include an augmentation plan?*

Answer - Yes. DNRC currently reviews and approves augmentation plans that offset adverse effects on senior water rights holders.

- *Can an applicant receive credit for return flows in assessing adverse impacts?*

Answer - Yes. Return flows can lessen the impacts on other water users and will be considered if evidence of such flows are a part of the record.

- *If no one objects to a permit application, must the DNRC still consider the legal availability and adverse effects test?*

Answer - Yes. DNRC must apply the statutory criteria in reviewing an application regardless of the presence or absence of objections by third parties.

### **Attorney General's Opinion and Water Court Storage Water Right**

Candace West, a Montana Assistant Attorney General, provided a handout explaining the guidelines for requesting an attorney general's opinion. A copy of the handout which addresses who may request an opinion and the requirements for making a request is included below in Appendix 2. Although to date, the Montana Water Court has postponed deciding on the status of storage water rights, a case could be certified to the Water Court for a decision. Ms. West stated her opinion that water will not allowed to be stored without a connection to a beneficial use.

## **Attorney General Bottomly 1947 Opinion, Don Brown District Court Decision, and the Montana Supreme Court Decision in MPC vs. Carey**

**Bottomly Opinion** - As reported in the February 5, 2007 Task Force meeting summary, Senator Jackson found in the report of the 32<sup>nd</sup> Legislative Assembly a statement by then Governor Bonner approving Senate Bill Number 9. In his approval statement, Governor Bonner referenced an approval of Senate Bill 9 by the attorney general. In response to a request by staff of Legislative Services, Candace West supplied a 1947 opinion by Attorney General R.V. Bottomly, which addressed Montana Power Company (MPC) hydropower water rights on the Missouri. Mr. Mueller had supplied a copy of this opinion to the Task Force in a memo dated February 23, 2007.

Attorney General Bottomly wrote his opinion to address whether MPC Missouri River hydropower water rights precluded construction by the Bureau of Reclamation of Canyon Ferry Dam on the Missouri upstream of the MPC dams. He concluded that, "The Power Company (MPC) has no right to preclude this construction (of the Canyon Ferry project)." As noted in Appendix 2, the opinion contains interesting language about MPC's hydropower rights. Two quotes are:

The conclusion is inevitable that no purported appropriations of the Montana Power Company can cover the full flow of the Missouri River. A contrary holding would "infringe the equal rights of individuals" and "the general well being of the state."

Control of the Missouri River must be retained for the welfare of the people as a whole. No claim of property right for an increased use of water by the power company should be permitted to prevent its full development. In no western state has any such right ever been recognized.

Mr. Mueller noted that while this opinion appears to be relevant to the situation with the Noxon Rapids project on the Clark Fork River, since 1947 other court decisions have been made addressing hydropower water rights. Two of these are the Don Brown decision by Montana District Court and the Montana Supreme Court decision in MPC vs. Carey.

**Don Brown** - Holly Franz summarized this case, which was one of her first water cases after she began practicing law. In the late 1970's, Idaho Power Company was sued by some of its ratepayers for failing to protect its Swan Falls hydropower water rights. To avoid similar suits, MPC began objecting to new water right permits on the Missouri River to protect its Missouri River hydropower generation rights. One such permit application was filed by Don Brown and Jerry Wallem to divert 100 cfs from the Jefferson River, a tributary of the Missouri River. Both the Bureau of Reclamation (BOR) and MPC objected to the permit asserting that no unappropriated water existed above Canyon Ferry Dam. After a hearing, a DNRC hearings examiner proposed overruling the objection and issuing the permit because BOR had claimed an excessive amount of water for its Canyon Ferry water right, an amount inconsistent with the Pick Sloan. When DNRC issued a final order incorporating the hearing examiner's proposed decision, BOR and MPC appealed to district court. District Court Judge Gordon Bennett reversed the DNRC decision because, "it was reached by determining water rights without the authority of law or substantial credible evidence and is not in conformity with the authorizing statute." (Page 2 of Judge Gordon Bennett's opinion and

order.) Judge Bennett ruled that only the Water Court, and not the DNRC, had the authority to decide on the size of the BOR water right at Canyon Ferry.

After Judge Bennett ruled, MPC, BOR, and DNRC entered into an agreement, known as the Don Brown Agreement. This agreement provided that DNRC would not appeal the Bennett decision; instead, the three parties would petition the Water Court to adjudicate the Missouri River hydropower water rights. They further agreed that after the Water Court ruled, DNRC would conduct a water availability study with the expectation that MPC or BOR would then petition to have the Missouri River closed to new surface water rights. However, the Water Court declined to do so, ruling that these rights would be the last in the basin to be adjudicated. No closure petition was filed. The basin was subsequently closed as a result of the water reservation process on the Missouri until such time as the adjudication is completed.

**MPC vs. Carey** - In this case, Martin Carey and other irrigators sought a permit to divert 1,575 gallons per minute of water up to 623 acre-feet per year from April 15 through October 15 from Cold Springs, a tributary of the Boulder River, which is in turn a tributary of the Jefferson River and thus of the Missouri River. DNRC determined that because of the hydropower water rights on the Missouri, sufficient water was not available to grant the permit without limiting conditions. The limitations were a reduced period of use to April 15 through August 1 when MPC's Cochrane Dam on the Missouri River at Great Falls was spilling. The volume was also reduced from 623 to 400 acre-feet per year. Carey, et. al. appealed to district court, and the district judge overturned the DNRC conditions. BOR and MPC then appealed the district court ruling to the Montana Supreme Court. The Supreme Court overruled the district court and restored the DNRC permit conditions. Mr. Mueller noted that the Supreme Court upheld DNRC's analysis of the impact of a small diversion on MPC's Missouri River hydropower water right, even though the diversion was far upstream of the hydropower project.

### **Public Comment**

There was no additional comment.

### **Next Meeting**

The next meeting was scheduled for 10:00 am on Monday, April 5, 2007 in the Bannock Conference Room of the DNRC offices at 1625 11<sup>th</sup> Avenue in Helena.



## Appendix 1

2007 Montana Legislature

SENATE BILL NO. 376

INTRODUCED BY JACKSON, HENDRICK, O'NEIL, ROSS, HEINERT, SESSO, MUSGROVE, KAUFMANN, BARKUS, VINCENT, CURTISS, LAMBERT, JOPEK, GEBHARDT, J. PETERSON, GLASER, ERICKSON, CALLAHAN, MENDENHALL

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION MAY ENTER INTO A CONTRACT WITH THE UNITED STATES FOR WATER HELD IN FEDERAL RESERVOIRS AS A MEANS OF PROTECTING THE STATE'S INTEREST IN THOSE WATERS; PROVIDING THAT THE STATE MAY CONTRACT FOR WATER FROM EXISTING FEDERAL RESERVOIRS IF WHEN THE WATER IS PUT TO BENEFICIAL USE, IT IS USED WITHIN THE BASIN IN WHICH THE RESERVOIR IS LOCATED; LIMITING THE AMOUNT OF WATER THAT CAN BE LEASED FROM THE STATE AS THE RESULT OF CONTRACTS FOR WATER FROM FEDERAL RESERVOIRS WHEN THE WATER WILL BE PUT TO BENEFICIAL USE IN A BASIN OTHER THAN THE BASIN WHERE THE FEDERAL RESERVOIR IS LOCATED; PROVIDING THAT THERE IS NO A LIMIT TO THE AMOUNT OF WATER FOR WHICH THE DEPARTMENT MAY CONTRACT FROM ANY FEDERAL RESERVOIR; AMENDING SECTION 85-2-141, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-141, MCA, is amended to read:

"85-2-141. Water leasing program. (1) There is a water leasing program administered by the department on behalf of the state of Montana.

(2) The department may acquire rights to water needed for leasing under this program:

(a) through appropriation of water in its own name; or

(b) by agreement with or purchase from another holder of water rights; or

(c) by contract with the United States for water held in federal reservoirs as a means of protecting the state's interest in those waters.

(3) Water for leasing under the water leasing program must be obtained from the following sources:

(a) any existing or future reservoir in a basin concerning which a temporary preliminary decree, a preliminary decree under 85-2-231, or a final decree under 85-2-234 has been entered;

(b) Fort Peck, Tiber, Canyon Ferry, Hungry Horse, KOOCANUSA, or Yellowtail reservoir, if an agreement a contract between the department and the federal government concerning the acquisition of water and the sharing of revenue with the state is in effect; and

(c) Tiber, Canyon Ferry, Hungry Horse, or Yellowtail reservoir if and as long as there is an agreement between the department and the federal government concerning the acquisition of water and sharing of revenue with the state from one or more of these reservoirs; and

(d)(c) any other existing or future federal reservoir:

(i) located in a basin concerning which a temporary preliminary decree, a preliminary decree under 85-2-231, or a final decree under 85-2-234 has been entered; and

(ii) for which and for so long as there is an agreement a contract between the department and the federal government concerning the acquisition of water and the sharing of revenue with the state.

(4) (a) Water may be leased The department may lease water to Montana water users for any beneficial use. The Except as provided in subsection (4)(b), the amount of water that can be leased under this program for all beneficial uses may not exceed 50,000 acre-feet.

(b) (i) Subject to subsection (4)(b)(ii), the department may lease up to 1 million acre-feet of water from each existing federal reservoir to Montana water users if when the water is put to beneficial use, it is used within the basin in which the reservoir is located.

(ii) Leases between the department and Montana water users that involve water from federal reservoirs that would result in water being put to beneficial use in a basin other than the basin in which the federal reservoir is located may not exceed 50,000 acre-feet.

(5) There is no limit to the amount of water for which the department may contract from any federal reservoir.

(4) (A) SUBJECT TO SUBSECTIONS (4)(B) AND (4)(C), THE DEPARTMENT MAY LEASE UP TO 1 MILLION ACRE-FEET OF WATER FROM THE RESERVOIRS IDENTIFIED IN SUBSECTION (3)(B) TO WATER USERS FOR BENEFICIAL USES IN MONTANA.

(B) THE DEPARTMENT MAY LEASE UP TO 50,000 ACRE-FEET OF WATER FROM THE RESERVOIRS IDENTIFIED IN SUBSECTION (3)(B) TO WATER USERS FOR BENEFICIAL USES OUTSIDE MONTANA.

(C) THE TOTAL AMOUNT OF WATER LEASED UNDER THIS SUBSECTION (4) MAY NOT EXCEED 1 MILLION ACRE-FEET.

(5)(6)(5) The term of any lease may not exceed 50 years. A term may be extended up to another 50 years if the department again determines the desirability of leasing by applying the considerations in subsection (7) (8) (7). In making a redetermination, the department may require the completion of an environmental impact statement in accordance with subsection (6) (7) (6).

(6)(7)(6) The department shall require the completion of an environmental impact statement under the provisions of Title 75, chapter 1, for lease applications that would result in the consumption of 4,000 acre-feet a year or more and 5.5 cubic feet per second or more of water and for any other application for which an environmental impact statement is required by law. The department shall require the completion of an environmental impact statement whenever the cumulative effect of more than one application for a lease would constitute a probable significant environmental impact.

(7)(8)(7) Upon application by a person to lease water, the

probable significant environmental impact.

(7)(8)(7) Upon application by a person to lease water, the department shall make an initial determination of whether it is desirable for the department to lease water to the applicant. The determination of desirability must be made solely on the following considerations:

- (a) the content of the environmental impact statement, if required;
- (b) whether there is sufficient water available under the water leasing program; and
- (c) whether the criteria, except as to legislative approval, set forth in 85-2-311 have been satisfied.

(8)(9)(8) The department shall for any lease agreement require commercially reasonable terms and conditions, which may include the requirement that up to 25% of the water to be leased be made available to a potential user for any beneficial use upon payment by the user of the costs of tapping into and removing water from the applicant's project. The department may differentiate in pricing, depending on the proposed beneficial use of the water.

(9)(10)(9) The lease of water or the use of water under a lease does not constitute a permit, as provided in 85-2-102, and does not establish a right to appropriate water within the meaning of Title 85, chapter 2, part 3.

(10)(11)(10) For purposes of the water leasing program established in this section, it is the intent of the legislature that the state act as a proprietor."

NEW SECTION. Section 2. Effective date. [This act] is effective on passage and approval.

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## Guidelines for Opinion Requests

Legal matters considered appropriate for a written opinion from the Attorney General's Office must meet the following requirements:

### VIII. Standing:

- The requestor must have standing for an opinion—that is, the request must be submitted and signed by one of the following: an elected state official; the leadership of the Montana House or Senate; a department head, chairperson of or chief counsel for a state office, board, or commission; a city attorney, town attorney, or county attorney; or the chairperson of or attorney for a board of county commissioners, 2-15-501(7) of the Montana Code Annotated.
- The request must involve a question of law relating to the requestor's office, MCA 2-15-501(7).
- **Legal Memorandum:** The request must be accompanied by a memorandum of authority citing basic research and points of law bearing upon the request. The memorandum should include the requestor's own conclusion on the question presented.

Written opinions from the Attorney General's Office typically involve the interpretation of a state statute. Some requests *may not* be appropriate for a written opinion. Such requests fall into the following categories:

- **Factual disputes:** questions involving factual disputes (e.g., credibility or liability questions). Matters which require the Attorney General to determine whether a party has engaged in criminal conduct often are primarily factual disputes and should be referred to the Prosecution Services Bureau unless they have general applicability.
- **Abstract questions:** questions concerning wholly abstract or hypothetical factual situations, the occurrence of which is unlikely or highly speculative.
- **Constitutionality of a law:** questions that involve the constitutionality of a statute.
- **Interpretations of federal law or a local ordinance:** questions that exclusively involve interpretation of a federal law or local ordinance. However, issues involving the relationship between state and federal or local law may be appropriate for a written opinion.
- **Matters in litigation:** matters that are directly at issue in pending litigation or that are more appropriately determined adversarially, including matters that will likely result in litigation irrespective of the outcome of a written opinion from the Attorney General's Office.
- **Interpretations of legislative bills:** interpretations of bills subject to future or ongoing legislative consideration or enacted bills not yet signed by the governor.